

1 ORRICK, HERRINGTON & SUTCLIFFE LLP
KAREN G. JOHNSON-MCKEYAN (SBN 121570)
2 kjohnson-mckewan@orrick.com
ANNETTE L. HURST (SBN 148738)
3 ahurst@orrick.com
GABRIEL M. RAMSEY (SBN 209218)
4 gramsey@orrick.com
405 Howard Street, San Francisco, CA 94105
5 Tel: 1.415.773.5700 / Fax: 1.415.773.5759
PETER A. BICKS (*pro hac vice*)
6 pbicks@orrick.com
LISA T. SIMPSON (*pro hac vice*)
7 lsimpson@orrick.com
51 West 52nd Street, New York, NY 10019
8 Tel: 1.212.506.5000 / Fax: 1.212.506.5151

9 BOIES, SCHILLER & FLEXNER LLP
DAVID BOIES (*pro hac vice*)
10 dboies@bsflp.com
333 Main Street, Armonk, NY 10504
11 Tel: 1.914.749.8200 / Fax: 1.914.749.8300
STEVEN C. HOLTZMAN (SBN 144177)
12 sholtzman@bsflp.com
1999 Harrison St., Ste. 900, Oakland, CA 94612
13 Tel: 1.510.874.1000 / Fax: 1.510.874.1460

14 ORACLE CORPORATION
DORIAN DALEY (SBN 129049)
15 dorian.daley@oracle.com
DEBORAH K. MILLER (SBN 95527)
16 deborah.miller@oracle.com
MATTHEW M. SARBORARIA (SBN 211600)
17 matthew.sarboraria@oracle.com
RUCHIKA AGRAWAL (SBN 246058)
18 ruchika.agrawal@oracle.com
500 Oracle Parkway,
19 Redwood City, CA 94065
20 Tel: 650.506.5200 / Fax: 650.506.7117

Attorneys for Plaintiff
21 ORACLE AMERICA, INC.

22 UNITED STATES DISTRICT COURT
23 NORTHERN DISTRICT OF CALIFORNIA
24 SAN FRANCISCO DIVISION

24 ORACLE AMERICA, INC.,
25 Plaintiff,
26 v.
27 GOOGLE INC.,
28 Defendant.

Case No. CV 10-03561 WHA

**ORACLE'S RESPONSE TO REQUEST
FOR FURTHER INFORMATION ON
GPL V.2 WITH CLASSPATH
EXCEPTION (ECF NO. 1804)**

Dept.: Courtroom 8, 19th Floor
Judge: Honorable William H. Alsup

Oracle offers the following response to the Court's Request for Further Information on GPL v.2 With Classpath Exception (ECF No. 1804).

Both sides shall submit a short statement with absolute accuracy stating when GPL v.2 with Classpath exception became available on the GNU Classpath Project for the Java class libraries.

The current version of the GPLv2-CE license first governed the Classpath Project sometime during the first half of 2002. Oracle has been unable to determine the exact date with available public resources because the entire record of the website for the Classpath Project has not been publicly maintained by the publishers of that site. Using the Internet Archive Wayback Machine, the first archived reference to the application of the GPLv2-CE license in its current form is April 1, 2002.¹ <<https://web.archive.org/web/20020202224726/http://www.gnu.org/software/classpath/>>

Developers often rely upon the license information contained in header files. The GNU Classpath source code files from the early 2002 time period are no longer available on the Classpath Project website. Oracle has confirmed, however, that *since 2002*, all versions of the GNU Classpath Project have been released under the GPLv2-CE license. <<http://www.gnu.org/software/classpath/downloads/downloads.html>>

Postings archived at the Classpath Project suggest that some developers working on the Project were familiar with Sun's Specification License, recognized its limitations, and understood that it was a copyright license to the APIs and not just a right to use the Java coffee cup logo upon satisfaction of the terms of the incorporated TCK license.²

What witnesses at trial will be able to explain with authority the apparent difference of opinion between Google and Oracle on the liberality or not of the GPL v.2 with Classpath exception?

The actual meaning of the GPLv2-CE license is not the precise issue. Beyond what it "actually" means (a question that might require a trial within a trial), what matters to Google's

¹ There was an earlier version of the "exception" language that was modified in late 2001 and early 2002. Oracle can supply references to the discussions regarding this earlier language if the Court wishes, but is mindful of the admonition to submit a short statement.

² Oracle is again mindful of the Court's admonition to keep it short and will supply these references if desired.

1 “custom” and “OpenJDK” arguments is what the industry thought that license meant and how it
2 should be applied, or, perhaps more pertinently in Oracle’s view, the fact that uncertainty
3 existed regarding what it meant and how to apply it, which led to unwillingness to take risks in
4 using it as a result. In order to prove that the GNU Classpath Project represents an “industry
5 custom,” Google must, as a threshold matter, show commercial acceptability of the GPLv2-CE
6 license (by those similarly situated to Google and its OEMs) before it even gets to a conversation
7 regarding whether there is a custom of disregarding the Specification License. Google offered no
8 such evidence with its proffer.

9 The Court has been presented with emails, Google blog posts, and public interviews
10 where Mr. Rubin and others repeatedly rejected use of any GPL-based license for the mobile
11 phone industry where OEM competitors sought to keep code proprietary. *See, e.g.*, ECF No.
12 1713-1. As to what Google’s in-house lawyers thought it meant at the time, the only thing that
13 Oracle knows is that “the lawyer-advised consensus is that there is a potential for trouble.”
14 TX415. If Google’s lawyers were consulted by the Android engineers at the time and privately
15 agreed with Oracle’s proffered interpretation, or agreed that there was a substantial risk that
16 Oracle’s interpretation was held by the mobile phone industry, then that would certainly be the
17 end of this entire matter.

18 As noted, the burden is on Google to prove this so-called “custom.” Google has not
19 disclosed witnesses to testify to the industry understanding of the GPLv2-CE license during the
20 relevant time frame. Oracle understands that Google intends to offer Mr. Hall to discuss the
21 license. Mr. Hall makes general conclusory statements about the scope of the GPLv2-CE license
22 and has no foundation or opinions demonstrating industry expectations in the mid-2000s. *See*
23 ECF No. 1566-2 at ¶118-122; *see also* ECF No. 1551-4 (Oracle MIL #1 re OpenJDK).

24 Oracle’s expert, Ms. Gwyn Firth Murray, will testify at trial regarding industry
25 expectations of the interpretation of the GPLv2-CE license (and regarding the proper
26 interpretation, as well). Ms. Murray is Oracle’s retained open source licensing expert. Open
27 source licensing has been the main focus of her career for 17 years. She has spoken at numerous
28

conferences and training seminars relating to open source software. Her expert report recites her qualifications (at 1-4), her open source related publications (at Appendix B), her open source related speaking engagements (at Appendix C), and her curriculum vitae (at Appendix D). *See* ECF No. 1775-1. Ms. Murray is the *only* witness who actually analyzes the language of the each of the relevant provisions of the license. *See id.* at ¶¶ 143-160.

Dated: May 4, 2016

KAREN G. JOHNSON-MCKEWAN
ANNETTE L. HURST
GABRIEL M. RAMSEY
PETER A. BICKS
LISA T. SIMPSON
Orrick, Herrington & Sutcliffe LLP

By: /s/ Alyssa M. Caridis
Alyssa M. Caridis

Attorneys for Plaintiff
ORACLE AMERICA, INC.